

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE SOUTHERN DISTRICT OF TEXAS

3 MCALLEN DIVISION

4 LIZELLE GONZALEZ § CASE NO. 7:24-cv-00132  
§ MCALLEN, TX  
5 VERSUS § WEDNESDAY,  
§ JULY 24, 2024  
6 GOCHA ALLEN RAMIREZ, et al. § 1:00 p.m. TO 1:56 p.m.

7 MOTION HEARING

8 BEFORE THE HONORABLE DREW B. TIPTON  
UNITED STATES MAGISTRATE JUDGE

9 APPEARANCES:

10 11 FOR THE PARTIES: SEE NEXT PAGE

12 ELECTRONIC RECORDING OFFICER: RICK RODRIGUEZ

13 COURT CLERK: UNKNOWN

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MCALLEN, TEXAS; WEDNESDAY, JULY 24, 2024; 1:00 p.m.

2 CLERK: The Court calls Civil action 724-132,  
3 Gonzalez v. Ramirez, et al. May I have appearances by counsel?

4 MS. GARZA: Good afternoon, Your Honor. Cecilia  
5 Garza, Lauren Johnson, and David Donatti for the Plaintiff

6 THE COURT: Okay.

7 MR. NAVARRO: Good afternoon, Your Honor. Ricardo J.  
8 Navarro for the Starr County defendants. And at my table are  
9 my two clients, District Attorney Mr. Ramirez and Alexandria  
10 Barrera.

17 MR. NAVARRO: Well, I think the responsive motion  
18 that we had and of course our Rule 12 --

19 THE COURT: Right.

20 MR. NAVARRO: -- and assertion of immunity on behalf  
21 of the individuals.

22 THE COURT: So are you wanting to do argument and  
23 then just kind of go back and forth until we're done with that?

24 MS. GARZA: I think that makes sense. He can go  
25 ahead and start with his motion and then we'll respond, Your

1 Honor.

2 THE COURT: Okay. That's what I expected. Do you  
3 agree?

4 MR. NAVARRO: Yes.

5 THE COURT: All right. Go ahead.

6 MR. NAVARRO: If I may, Your Honor.

7 THE COURT: You bet.

8 MR. NAVARRO: When we were first retained in the  
9 case, I think that not all of the defendants had been served  
10 and we had communicated with opposing counsel and agreed to  
11 some waivers of service and agreed to the first amended  
12 complaint, which is the live complaint in the case. That's the  
13 complaint against which we filed our Rule 12 motion.

14 So at this point we represent the two individuals who  
15 are from the prosecution office, the District Attorney's  
16 Office, Mr. Ramirez and Ms. Barrera. That office, the case  
17 arises out of Starr County, Your Honor, but I would ask the  
18 Court to take judicial notice that this is a judicial district  
19 that covers three counties. So Starr County is in it because  
20 the incident involved, and it happened in Starr County. But  
21 the judicial district in which Mr. Ramirez and Ms. Barrera  
22 worked is actually at the Reeves County District --

23 THE COURT: You're talking about the state judicial  
24 district?

25 MR. NAVARRO: Yes, it's the state judicial district.

1                   THE COURT: All right. I thought you were talking  
2 about the federal. Okay. Go ahead.

3                   MR. NAVARRO: So if Starr County is in it just  
4 because the incident happened in Starr County. But they  
5 actually exercised their judicial prosecutorial functions in  
6 two other counties as well.

7                   We filed our Rule 12 motion to dismiss and then we  
8 also filed, and I confirmed with Counsel we invoked this  
9 doctrine, this limited doctrine that allows some limited review  
10 or use of documents in the context of a Rule 12. That doctrine  
11 is in my view is a more recent vintage. It wasn't really in  
12 play when I first started doing 1983 work. But is now in play  
13 and can be used on limited circumstances to (indiscernible).

14                   The point of the Rule 12 is that -- and the documents  
15 that were submitted in support of it which we asked to be put  
16 under seal and which we ultimately agreed to be put under seal,  
17 was that the allegations contained in the complaint have a lot  
18 of conclusory jury arguments about the case involving a  
19 conspiracy between the Sheriff's Office and the District  
20 Attorney's Office.

21                   And the bald facts of the case are that the  
22 complaint, the criminal complaint that originally came -- and  
23 this is pleaded in the first amended complaint, I don't think  
24 I'm saying anything that's not in there -- originated in the  
25 hospital with Ms. Lizelle Gonzalez own doctor. It was against

1 the backdrop of the Texas Heartbeat Act which had been passed  
2 just the year before. That's Senate Bill 8. We think that the  
3 existing documentation reveals that Ms. Lizelle's own doctor  
4 was quite confused about how that law worked and appears to  
5 have been the reason why there was a criminal case referral  
6 made to the local authorities.

7 The pleadings themselves say it was directed to the  
8 cities, police, as well as to the Sheriff's Office. And the  
9 Sheriff's Office did ultimately investigate the matter. That  
10 case was -- later when an investigation was complete, the court  
11 has in the sealed documents some of the more critical  
12 investigative documents that were generated by the  
13 investigators.

14 There was also a couple of grand jury subpoenas that  
15 were issued in order to get the medical records from the  
16 doctors and hospital.

17 MS. GARZA: Your Honor, if I may. I apologize, Mr.  
18 Navarro. But he is referencing some information that is in the  
19 sealed documents, and this is not a sealed, closed courtroom.  
20 So we would just --

21 THE COURT: What did he reference that was -- that  
22 shouldn't -

23 MS. GARZA: He referenced the police department; he  
24 also referenced information that is only in the sealed  
25 documents that's not in the pleadings and not in the public

1 record. So I would just to be careful about that, how we --.

2 THE COURT: So the fact that the police department  
3 was involved is not something that needs to be sealed. Right?  
4 Just information that will be in the reports. I didn't hear  
5 him talk about anything that was in the reports.

6 MS. GARZA: That's correct. But it's only found in  
7 the sealed documents.

8 THE COURT: What is?

9 MS. GARZA: The fact that it was reported to the  
10 police department.

11 THE COURT: All right. So let's be careful about  
12 what we think that is in the sealed documents.

13 MR. NAVARRO: And I'm trying to -- and I'm going to  
14 limit my references to the description of the sealed documents  
15 that was part of the motion. Okay?

16 THE COURT: Okay.

17 MR. NAVARRO: But we think that the Court ought to  
18 take those into consideration in evaluating the Rule 12. And  
19 this is an area where I think that even the Plaintiff's own  
20 pleadings reveal that this was in terms of Mr. Ramirez and Mr.  
21 Barrera that they were reviewing this investigative file in  
22 their prosecutorial capacity, but the file was actually  
23 presented by Ms. Barrera to the grand jury and the grand jury  
24 issued an indictment. That's -- that did happen.

25 We can't really get into the specifics about what

1 happened there because of the grand jury's secrecy laws and  
2 we're somewhat constrained there. And it clearly was done and  
3 within their scope of their authority as judicial officers.

4 Mr. Ramirez was in fact himself not there at that  
5 time. Later on after the indictment had been issued as pleaded  
6 there and the defense attorney was -- came to visit him as  
7 pleaded, it was brought to his attention that there was an  
8 additional section to the Code, 1906, that created an exemption  
9 to what otherwise appeared to qualify as a murder charge. And  
10 at that point Mr. Ramirez did dismiss the indictment.

11 That's really the case. At worst, at worst it's a  
12 failure to understand or to a negligence understanding that  
13 there was an additional exemption to that statute, the 1906.  
14 It's a question of not looking far enough down the statute to  
15 see that it was there and that it applied. If one reads just  
16 the beginning portions of it, the facts presented in the  
17 investigation do look here to present a proper charge. But it  
18 would have fallen to the DA's office to at that point look at  
19 that last section. And that's what was overlooked.

20 This is at best or at worst a negligence case. It's  
21 not a Section 1983 civil rights case. They're trying to make  
22 it into something much more than what it is. And we think that  
23 as far as the immunity protections available to judicial  
24 officers and to likely district attorneys, that those apply  
25 with equal force to the elected district attorney as they do to

1 his assistant.

2 THE COURT: So are you doing qualified immunity,  
3 absolute immunity, or both?

4 MR. NAVARRO: Both.

5 THE COURT: Okay.

6 MR. NAVARRO: We think the absolute immunity is to  
7 the extent that there's a prosecutorial decision in the  
8 presentation of the case to the grand jury. And then the  
9 qualified immunity on anything other than that would fall  
10 outside of that, which is very narrow. I think it's primarily  
11 an absolute immunity prosecutorial defense.

12 THE COURT: And I was calling it absolute. That's  
13 what I was referring to, prosecutorial.

14 MR. NAVARRO: And so it's not exactly the same as the  
15 immunity of a judge, but it's pretty close. Because to the  
16 extent that the elected official, the district attorney and his  
17 staff are working in the courts, it's a judicial function that  
18 they're exercising --

19 THE COURT: What about malicious prosecution?

20 MR. NAVARRO: I'm sorry?

21 THE COURT: What about a malicious prosecution  
22 charge?

23 MR. NAVARRO: Well, the malicious prosecution charge,  
24 I mean, you're going to have to show intent. And I think that  
25 at the pleading stage I will acknowledge to the Court candidly

1 that that's a more difficult area. And that's why we invoked  
2 this doctrine as we're looking at some of these investigations  
3 that were put under seal. Because I think the issue of the  
4 malicious prosecution, we've got to get the intent. I  
5 understand that's why it's pleaded the way it is. But --

6 THE COURT: How can you get into intent without  
7 allowing depositions on what was going through people's minds  
8 as opposed to just what the papers have to say?

9 MR. NAVARRO: Well, I mean, that's where I think we  
10 are going to need to decide, how are we going to resolve that.  
11 Because it's not only -- the law is that on the assertion of  
12 immunity, whether it's qualified immunity or absolute immunity,  
13 the defendant is also entitled to be free of the burdens of  
14 discovery.

15 THE COURT: Well, but there is limited discovery, for  
16 example on qualified immunity. You normally have a dual track.  
17 And what I'm trying to do is put this more like an excessive  
18 use of force from a police officer or somebody who is a prison  
19 guard. And so typically what will happen is they get two bites  
20 at the apple at summary judgment, not a motion to dismiss.

21 MR. NAVARRO: Right.

22 THE COURT: And it's normally on 1983 grounds. You  
23 do some limited discovery that is dedicated to the qualified  
24 immunity exclusively. And then once that's resolved, then we  
25 open it up to full discovery for the case to go forward. Is

1 that not the proper process for this?

2 MR. NAVARRO: That would be -- if the Court  
3 determines that the issue of intent is sufficiently central to  
4 the case.

5 THE COURT: Well, I mean, the only reason I brought  
6 it up was you brought it up. You were saying that the only way  
7 to get there is with intent.

8 MR. NAVARRO: Well, on the malicious prosecution.

9 THE COURT: Right.

10 MR. NAVARRO: But they are still -- they are still in  
11 their judicial function as far as presentation of the case.

12 THE COURT: But even if they're in a judicial -- and  
13 I guess that was my original question. Can a prosecutor still  
14 be sued under 1983 for malicious prosecution if they're just  
15 doing their job, presenting stuff to a grand jury under certain  
16 circumstances?

17 MR. NAVARRO: And the caselaw says no.

18 THE COURT: Okay. Ever?

19 MR. NAVARRO: The caselaw that we have says that if  
20 they're acting within the scope of their prosecutorial  
21 function, even improper or intent or malicious intent, does not  
22 penetrate the absolute immunity bar.

23 THE COURT: Okay. All right.

24 MR. NAVARRO: And we've cited those cases to the  
25 Court.

1 THE COURT: Okay.

2 MR. NAVARRO: So we would ask that as to the  
3 prosecutors, that the Rule 12 be granted. As to the Sheriff  
4 Fuentes, that is a qualified immunity case as we're not  
5 asserting absolute immunity as to Fuentes.

6 And with him, again, the pleadings are based on these  
7 allegations that there was some coordination of effort or  
8 conspiracy with the prosecutors, with the investigators. And  
9 the facts on that really are not going to bare out that there  
10 was -- he is the elected sheriff. This came over as a criminal  
11 complaint from the hospital. It was investigated as a criminal  
12 complaint by the sheriff's investigators. The sheriff himself  
13 was not involved in those investigative efforts.

18 THE COURT: So again at the Rule 12 stage, the only  
19 way that you can establish that is by submitting evidence.

20 MR. NAVARRO: I think with the sheriff it may take  
21 that. It may take that. Or we may need more pleadings as to  
22 what exactly the sheriff -- the pleadings are fairly conclusory  
23 as to the sheriff.

24 THE COURT: But, I mean, they say what they say,  
25 which is you're supposed to take everything that's in the

1 pleading as true. So are you making a distinction between the  
2 prosecutors and the sheriff as far as --

3 MR. NAVARRO: I am.

4 THE COURT: Okay, all right.

5 MR. NAVARRO: I am. I think the sheriff is in a  
6 different place than the prosecutors. Because the protections  
7 for the prosecutors are functional in terms of them acting  
8 within their prosecutorial office regardless of their intent,  
9 whereas with the sheriff, he does not have that. So with the  
10 sheriff, he's more on a qualified immunity. And I think that's  
11 where the more blended approach on qualified immunity could  
12 come into play.

13 THE COURT: Okay.

14 MR. NAVARRO: So the part where they deny the --  
15 that's why we filed a separate Rule 12 as to the sheriff. So  
16 if the Court were to say, well, as to the sheriff I think they  
17 get there, we would probably at that point answer for the  
18 sheriff and then come back with an MSJ-based qualified immunity  
19 to flesh out that case. But the sheriff's case and the  
20 prosecutor's cases are two different sets of facts.

21 THE COURT: Okay. All right. Okay. Hear from the  
22 Plaintiffs?

23 MS. GARZA: Your Honor, with your permission, both  
24 Ms. Johnson and I will be addressing separate things with the  
25 Court.

1 THE COURT: Fine. Sure.

2 MS. JOHNSON: Good afternoon, Your Honor. Lauren  
3 Johnson and I will begin. May it please the Court.

4 Your Honor, in our justice system it is a violation  
5 of the highest order when those we entrust to uphold the law  
6 deliberately charge a person when they know that person did not  
7 commit a crime.

8 Lizelle Gonzalez' case is even more egregious than  
9 that. It's not a case where law enforcement simply ignored  
10 evidence that undermined probable cause, nor is it a case of  
11 mere negligence as alleged by defense counsel. This is a case  
12 in which Ms. Gonzalez has alleged that the sheriff and the  
13 district attorneys understood that Lizelle Gonzalez' conduct  
14 was not a crime under state law.

15 THE COURT: So what evidence do you have of that?  
16 Because that's really what we get down to is that you're going  
17 to have to prove intent. So how are you going to -- if they  
18 say we didn't know, we just missed that, how are you going to  
19 disprove that?

20 MS. JOHNSON: Well, Your Honor, I think that there's  
21 a very basic expectation that law enforcement who are upholding  
22 and enforcing laws have an obligation to know what those laws  
23 are and what the limitations of them are. And here --

24 THE COURT: Well, I think people get charged all the  
25 time and they go oh, well, I thought that fit that statute, or I

1 didn't think that exception applies. I think people get  
2 charged that way all the time. Maybe if they -- like I said,  
3 this is a really new law. If there is something that's further  
4 down in the statute they didn't read, this hasn't been applied  
5 very much, this is new, how is that not just them -- for  
6 example, like I said, it may have been negligence for them not  
7 to see it. But aren't you going to have to prove, well, we saw  
8 it and we chose to ignore it and go after her anyway?

9 MS. JOHNSON: Your Honor, the statute is so clear  
10 that that is the only reasonable inference in this case. Here  
11 it's not an example of a newly passed law. And we put in our  
12 pleadings to how not only is the way the statute is written  
13 very clear that this statute, Section 19 does not apply.  
14 That's the entire homicide portion of the statute. Does not  
15 apply to the mother of the unborn child with regard to the  
16 death of that child.

17 There are also cases where the Courts have looked at  
18 this question and found that the pregnant person, the pregnant  
19 woman could not be prosecuted, that there was no crime where  
20 the allegation was based on the demise of the child at the  
21 expense or the cost of the actions of the mother.

22 So this is something that is not new, has been very  
23 clear. And even where defense counsel points --

24 THE COURT: But the statute is new. You would agree  
25 the statute is new.

1 MS. GARZA: No, Your Honor.

2 MS. JOHNSON: No, Your Honor.

3 THE COURT: Well, I'm talking about this particular  
4 part. He was just talking about something just got passed.

5 MS. JOHNSON: No, Your Honor. And I can actually  
6 speak to that specifically.

7 THE COURT: Okay.

8 MS. JOHNSON: First of all, homicide statute itself  
9 and that extension is not new.

10 THE COURT: I understand that.

11 MS. JOHNSON: But with regard to the Heartbeat Act,  
12 Your Honor --

13 THE COURT: Right.

14 MS. JOHNSON: -- I think that case -- that example is  
15 even more -- even more evidence of how the government knew that  
16 there was no criminal enforcement power.

17 First of all, SB-8, that only applied to civil  
18 enforcement. And the attorney general was very clear and the  
19 language of the statute itself is very clear that it does not  
20 grant any authority by the government to criminally prosecute.  
21 And it also explicitly says that the civil statute, the civil  
22 penalties cannot even be enforced against the pregnant woman.

23 And so in all instances Texas law has been and has  
24 continued to be clear the pregnant woman cannot be prosecuted  
25 in the way that these defendants chose to do so.

1                   And I would also note that the Court can consider  
2 whether or not this was a snap decision, a snap judgment that  
3 was made very quickly without the opportunity to really  
4 deliberate and better inform the course of action. But here  
5 the Court has an entirely different picture. It has an  
6 investigation that took place over the course of not weeks, but  
7 months and that after there was indictment, after there was  
8 even an investigation, there was an indictment. And then later  
9 an arrest. This was a deliberative process at which time those  
10 actors had every opportunity to correct their behavior. But  
11 rather the fact that this time passed and that they continued  
12 with that goal suggest that they were aware of it and were  
13 trying to build a case in spite of it. So that's --

14                   THE COURT: Was there ever a time when the defense  
15 attorneys or the attorneys representing your client informed  
16 the prosecutors, hey, you can't even criminally charge them,  
17 and they chose to ignore that?

18                   MS. JOHNSON: That is not something that we have  
19 pled, Your Honor, as far as --

20                   THE COURT: Well, I don't care what you pled. I'm  
21 asking if that happened.

22                   MS. GARZA: Actually the information that we have,  
23 Your Honor, is that she did not have a criminal defense  
24 attorney until after she was arrested and shortly before  
25 dismissal. Within a day.

1 THE COURT: Okay. So when that happened, when was  
2 the first time that you think that the prosecutors at least  
3 were put on notice that they couldn't go after her criminally?

4 MS. JOHNSON: At the beginning of the case when they  
5 decided to investigate.

6 THE COURT: And how did they know that?

7 MS. JOHNSON: Because they decided at the outset to  
8 call this a criminal homicide investigation.

11 MS. JOHNSON: Yes, Your Honor.

12 THE COURT: At some point they figured out, oh, we  
13 can't proceed criminally. At what point -- as opposed to  
14 should have figured out, at what point do we know that they  
15 were informed? For example, that's why I was asking about the  
16 defense attorneys. Did the defense attorneys or did somebody  
17 call them up and go you can't go after them criminally under  
18 this statute. As opposed to you should have figured it out on  
19 your own. That's different.

20 MS. GARZA: Your Honor, at this point without  
21 evidence, it's hard to say what --

22 THE COURT: But that's your client.

23 MS. GARZA: Excuse me?

1 or some attorney.

2 MS. GARZA: Right. And we don't know what was  
3 discussed between our client's defense attorney and the  
4 district attorney. We do know that at all times they knew what  
5 the statute said.

6 THE COURT: How do you know that? I mean, what if  
7 they just blew it? What if they just -- you know, I blow it  
8 every now and then. I go oh, you know, my staff says, Judge,  
9 you completely forgot to do this. Happened today. I had to  
10 call some defendants back in because I just blew it. I forgot  
11 something. Brought them back in, and I read the client their  
12 rights. I didn't do that intentionally. I just missed it.

13 MS. GARZA: I think that we can infer, Judge, on the  
14 fact that the investigation did take four months. This is  
15 Starr County, a small county where there are not a lot of  
16 murder indictments that come out of Starr County. So this was  
17 a case that was investigated and looked at.

18 So you're right, I can't say right now what they did  
19 or did not know or when they learned it. But you can infer  
20 that based on this type of murder indictment, the fact that  
21 there are so few murder indictments in Starr County, that this  
22 is knowledge that they had.

23 THE COURT: Do you agree that knowledge is required  
24 as opposed to reckless disregard?

25 MS. JOHNSON: No, Your Honor, we disagree. It can be

1 that it's wanton disregard that is the basis. But here --

2 THE COURT: What's the difference between reckless  
3 disregard and wanton disregard? I don't know that I've heard  
4 that.

5 MS. JOHNSON: I maybe --

6 THE COURT: Okay. Well, I wasn't trying to get  
7 snarky. I've not heard wanton disregard. Okay.

8 MS. JOHNSON: Your Honor, I guess what I want to  
9 bring the Court back to or highlight is I think at this point  
10 the Court is asking questions that certainly could inform, but  
11 that Ms. Gonzalez has not yet had the benefit of discovery to  
12 fully probe. And at this point --

13 THE COURT: But you pled it. You pled that they  
14 knew.

15 MS. JOHNSON: Yes, Your Honor. And at this point  
16 intent can be pled generally based on reasonable inferences,  
17 which are the nature of the investigation, the amount of time  
18 that it took, and the level of coordination that it required  
19 over the course of four months as opposed to a snap judgement.

20 Also given that this is the kind of case that was a -  
21 - it was a big deal to bring this kind of case. And certainly  
22 the Court can also take into consideration that there's an  
23 expectation that when DAs are working together, when the  
24 district attorney is supervising his ADAs, that he would know  
25 the law and its limitations and that that would be --

1                   THE COURT: But again, I'm a federal judge. I don't  
2 know all federal law. I have to prepare for stuff. I had to  
3 prepare for this hearing. You can't just presume that I know  
4 all federal law. So I don't think that you can assume that a  
5 DA knows all laws off the top of their heads.

6                   MS. GARZA: Your Honor, it is also in our petition  
7 that DA Ramirez was sanctioned by the Texas Bar for knowingly  
8 going forward with a criminal prosecution that he should not  
9 have gone forward with. So that is pled in our petition, that  
10 there is at least some finding somewhere, that there is  
11 evidence out there that there was knowing, that this was a  
12 knowing act.

13                  THE COURT: What do you think about the difference  
14 between the prosecutors and the sheriff, the qualified immunity  
15 versus the prosecutorial immunity?

16                  MS. JOHNSON: Well, Your Honor, we agree with the  
17 defense counsel that there is a different consideration with  
18 regard to prosecutors when they're acting within their quasi-  
19 judicial function and that the cases have lined out that  
20 distinction.

21                  However, where we disagree is that the actions of the  
22 DAs in this case fell within that function. And so we've pled  
23 --

24                  THE COURT: Fell within the function?

25                  MS. JOHNSON: Yes, Your Honor.

1                   THE COURT: Within the function of their  
2 prosecutorial --

3                   MS. JOHNSON: We have pled that they were outside the  
4 scope of their prosecutorial function.

5                   THE COURT: You said within.

6                   MS. JOHNSON: I apologize, Your Honor.

7                   THE COURT: Okay, all right.

8                   MS. JOHNSON: And so we are in agreement that there  
9 are certain kinds of actions that would be entitled to absolute  
10 immunity. But that's not the case here --

11                  THE COURT: What are the allegations that are outside  
12 the judicial function or the prosecutorial function?

13                  MS. JOHNSON: The allegations are that in advance  
14 before there was an investigation of prosecution of Lizelle  
15 Gonzalez specifically, that there was an agreement between the  
16 hospital and the district attorney's office and/or the  
17 sheriff's office to gather information about these types of  
18 cases, these types of cases being women who were suspected to  
19 have had abortions, for the purpose of criminal prosecution  
20 despite Texas Penal Code 19.06 clearly prohibiting that kind of  
21 prosecution against that kind of individual.

22                  THE COURT: So how do you know that? And who is it  
23 with, the sheriff or the prosecutors?

24                  MS. JOHNSON: Your Honor, at this point we have pled,  
25 based on information and belief that there was an agreement

1 that may have included both. We certainly have with regard to  
2 Lizelle specifically pled that there was collaboration about  
3 her specific case based on information that was provided by the  
4 hospital.

5 THE COURT: But, I mean, you can say anything on  
6 information and belief. So I am trying to figure out -- at  
7 some point your expectation is that there's evidence showing  
8 that, for example the DA or the DA's office knew, or they had  
9 this agreement. But is that your suspicion or is -- what  
10 evidence do you expect is going to show?

11 MS. JOHNSON: Admittedly, Your Honor, we have not had  
12 the opportunity to have fulsome discovery or any discovery at  
13 this point. But we do expect that there will bear out that  
14 there were additional investigations with regard to other women  
15 besides Lizelle Gonzalez for the purpose of criminal  
16 prosecution.

17 THE COURT: Okay. All right, go ahead. I'm sorry.

18 MS. JOHNSON: If the Court would just bear with me  
19 briefly.

20 THE COURT: Yeah. I threw you all over the place,  
21 didn't I? Sorry.

22 MS. JOHNSON: No, that's fine. That's fine. I want  
23 to address Your Honor's questions.

24 Your Honor, so as I said, this is a case where we  
25 don't agree that this is a case of negligence. We do believe

1 that the case will ultimately bear out that there was an  
2 understanding of the limitations of the law and that the  
3 district attorneys and sheriffs acted in spite of it.

4 THE COURT: So I'm going to ask you again. Because  
5 now that you set an understanding, that kind of gets into me  
6 back into the mind that -- are you going to have to prove that  
7 they knowingly did this or do you think reckless disregard?  
8 Because that's not knowing. So those are different standards.  
9 What is the standard?

10 MS. JOHNSON: Your Honor, and I will look to the case  
11 exactly. But I believe that the law draws with regard to  
12 absolute immunity doctrine that it covers -- it doesn't cover  
13 intentional -- basically knowing violations, but also  
14 violations that are so kind of glaringly obvious or reckless.  
15 And so I don't want to misstate exactly the language. I can  
16 find that to give Your Honor.

17 THE COURT: So you think it could be something other  
18 than knowing?

19 MS. JOHNSON: Yes.

20 THE COURT: In other words, so if they deny it and  
21 you say, well, it was so obvious you should have known?

22 MS. JOHNSON: Yes, Your Honor. And also, Your Honor,  
23 I think that what's most important about the discovery process  
24 is it will allow more information to inform the Court to make  
25 that assessment. But here, as the Court is taking the

1 allegations as pled as true, we have shown that there was  
2 sufficient understanding of the law and that Ms. Gonzalez is --  
3 it not being applicable to her conduct.

4 THE COURT: Okay.

5 MS. JOHNSON: Your Honor, I would just note that  
6 obviously Ms. Gonzalez' prosecution and arrest had a hugely  
7 devastating impact in addition to her being publicly branded as  
8 a murderer. Her case received national attention. And her  
9 life and the life of her family has been severely impacted.

10 And so, Your Honor, we submit that the motions that  
11 the Court has before it from the defendants are attempts to not  
12 be held to account. We ask the Court to deny the motions to  
13 dismiss as not founded and at odds with existing precedent and  
14 also as a request to extend absolute immunity and qualified  
15 immunity doctrine to extraordinary lengths to prohibit conduct.

16 First --

17 THE COURT: Well, qualified immunity is easy. We do  
18 discovery on qualified immunity. What I'm trying to figure out  
19 is what to do with the prosecutorial immunity.

20 MS. JOHNSON: Well, with regard to the prosecutorial  
21 immunity, Your Honor, there are a number of cases that talk  
22 about what's outside the scope. And one of the lines of cases  
23 talks about investigatory functions or the DA's involvement in  
24 investigatory functions. And what Ms. Gonzalez has pled is  
25 that the DAs were involved in an investigatory plan prior to

1 Lizelle's specific case and that in her specific case they were  
2 providing legal advice and directly involved in that process  
3 over the course of the four months for when Ms. Gonzalez first  
4 received care at the hospital to when she was ultimately  
5 indicted on March 30th. And so that -- I'm sorry -- and  
6 arrested after that on April 4th.

7 And so as the Court is aware, that kind of conduct  
8 where the DAs are acting more like the detectives or police  
9 officers than as advocates is not protected by absolute  
10 immunity.

11 Similarly, *Buckley v. Fitzsimmons* and its progeny  
12 talk about how when the DA is acting before probable cause or  
13 without the existence of probable cause, that kind of action is  
14 not given the same kind of protections as absolute immunity.  
15 And in part it's because we don't have the same safeguards that  
16 a person has in the criminal system where the Court can look at  
17 the courtroom conduct of the DA, for example, or the  
18 presentation of evidence in the grand jury and make a decision  
19 as to whether or not that conduct was violative.

20 And so where we had investigation action happening  
21 beforehand and the process of how to build a case for the grand  
22 jury happening with the collaboration of the DA and the  
23 sheriff, that is outside of the quasi-judicial function, and  
24 it's not entitled to absolute immunity.

25 THE COURT: Okay.

1                   MS. JOHNSON: Additionally, Your Honor, I would just  
2 also raise Ms. Garza will speak specifically to the exhibits  
3 that the Court has raised. But I would ask the Court to really  
4 think about the implication that the defendants are drawing  
5 here. They're asking the Court to hold against Ms. Gonzalez  
6 that she hasn't had discovery, that she has not -- that she  
7 does not have access to information that is uniquely in the  
8 possession of the defendants and subject to heightened secrecy  
9 because of the investigative and grand jury process. And at  
10 the same time they're submitting these documents that they  
11 claim support their arguments or their allegations without  
12 giving her the opportunity to probe it. And Ms. Garza will  
13 speak more specifically to why the Court should not do that  
14 without first giving her the opportunity to inform the Court  
15 with discovery.

16                   And finally, we'll speak -- I'll speak to the county  
17 liability claim, Your Honor. As the Court is aware, Ms.  
18 Gonzalez has also brought a claim against the County because  
19 the DA and the sheriff's office acted as final policymakers  
20 together and acted in violation of Texas law to further an  
21 unconstitutional policy of investigating women who had  
22 abortions with the goal of prosecuting them criminally.

23                   So we will ask Your Honor to reject these attempts by  
24 the Defendants to avoid liability and we ask that Your Honor  
25 give Ms. Gonzalez' claims the opportunity to have informed and

1 reasoned consideration. And Ms. Garza will speak first with  
2 regard to the facts.

3 THE COURT: Okay.

4 MS. GARZA: Yes, Your Honor. Defendants rely heavily  
5 on the sealed exhibits that were filed with the Court.  
6 However, the caselaw is very clear in that area and --

7 THE COURT: So we keep talking about sealed exhibits.  
8 Let me just make sure I understand it. Is your objection to  
9 the fact that they were sealed or is your objection to me  
10 considering whether or not they're sealed or not?

11 MS. GARZA: The objection is considering them as part  
12 of the 12(b) (6) motion.

13 THE COURT: Okay. So the fact that they're sealed is  
14 not part of your complaint --

15 MS. GARZA: No. I'm just referring to them because  
16 that's how they're characterized within the record. Yes.

17 THE COURT: All right.

18 MS. GARZA: Yes. It has nothing to do with -- we  
19 agree that they should be sealed at this point.

20 THE COURT: Okay.

21 MS. GARZA: Your Honor, the caselaw is quite clear  
22 that you -- when determining a 12(b) (6) motion, you're limited  
23 to four corners of the pleading itself. There is a very rare  
24 exception when you can take into account other documents.  
25 However, that exception does not exist in this case. The

1 exception is you can consider documents outside of the  
2 pleadings if they are specifically referred to in Plaintiff's  
3 original complaint. In this case, we are not.

4 Defendants are trying to make a stretch, saying  
5 because we are alleging that the DA and the sheriff were acting  
6 in coordination with regard to an investigation. And over and  
7 over again admittedly we say that there was an investigation.  
8 Obviously the investigation is part of our claims. But they're  
9 making a leap to say that by us referencing an investigation,  
10 that we are specifically referring to specific documents within  
11 the investigation. That's clearly, that's outside of the case  
12 law. Scanlan v. Texas A&M University specifically considered  
13 even when a report was mentioned within the complaint. Fifth  
14 Circuit says no, you can't rely on bits and pieces of the  
15 report just because the report in its entirety was referred to  
16 in the complaint.

17 There is no doubt, and I think that Defendants would  
18 have to concede that at no point in Plaintiff's amended  
19 complaint do we refer to any investigative reports, any grand  
20 jury subpoenas, anything that they have produced, and they are  
21 asking the Court to consider. I think everybody would agree,  
22 we did not specifically request those -- refer to those  
23 documents.

24 In fact, defendants concede that we were -- Plaintiff  
25 Gonzalez was not even aware of the documents or the contents of

1 the documents until they were provided after they were filed  
2 under seal. So there's no way that Plaintiffs could have been  
3 referring to documents that we didn't even know existed, Your  
4 Honor. So I don't believe they meet that burden. And I think  
5 the caselaw is quite clear that those documents don't come in  
6 for your consideration under 12(b) (6) motion.

7 Normally when that is -- the documents have to be  
8 central to the claim. And what the courts usually allow  
9 documents to come in is in the contract, sales agreement, a  
10 lease. Something where the document itself is central to the  
11 claim that's being made. That's not the case here, Your Honor.

12 And if the Court does consider those initial  
13 documents, then this motion, pursuant to Rule 12, would be  
14 considered a Rule 56 motion at that point. Like the Court was  
15 alluding to earlier, it would be a motion for summary judgment.  
16 And that comes later in the proceeding, or at the very least  
17 would give Plaintiff the opportunity to conduct discovery and  
18 to offer evidence of our own.

19 In this particular case, they are cherry-picking  
20 certain documents that they feel, according to Defendant's own  
21 argument, rebut our allegations. This is not an evidentiary  
22 proceeding. This is just a simple hurdle. Did the Plaintiffs  
23 plead with sufficient factual allegation as to whether there is  
24 a claim that may go forward? This is not the evidence part of  
25 the proceeding, Your Honor. And so this is -- it would be

1 inappropriate for the judge to consider such documents at this  
2 time. So we're asking that the documents be stricken, and the  
3 Court not consider these seven exhibits with regard to the  
4 12(b) (6) motion.

5 THE COURT: All right. Yes, sir. Do you have  
6 anything further? I'm not suggesting you should. I'm just  
7 looking --

8 MR. NAVARRO: Yeah, I do actually have some rebuttal,  
9 Your Honor, if I may.

10 THE COURT: Go ahead. Sure. I'll let both of you go  
11 back and forth.

12 MR. NAVARRO: So under federal practice when lawyers  
13 plead a case, we are bound by Rule 11 in terms of having a  
14 factual basis to make the kinds of pleadings that we make.  
15 When we read these pleadings and there were allegations about  
16 these conspiracy and knowing and having agreements between the  
17 DA and the hospital and we were looking at that, it just struck  
18 us that the pleadings reference information that was not  
19 apparent to us. We really wonder where that came from.

20 I talked to counsel. The reason I wanted them to  
21 have some documents in addition to (indiscernible), I said I  
22 have some documents I would like to share with you. I would  
23 like to do it under a confidentiality order, which they agreed.  
24 And I would like to do it under seal because I think that -- I  
25 don't know where you're getting what you're getting. What I

1 have doesn't match this. I would like for you to consider this  
2 and look at that and to see if it makes a difference. Because  
3 we think that they go against the kinds of allegations that  
4 you're making --

5 THE COURT: But does that mean I can't consider them?  
6 So the point of a Rule 12 --

7 MR. NAVARRO: I think you can consider them, Your  
8 Honor.

9 THE COURT: Okay. When in a 12(b) (6) motion can I  
10 consider evidence that is not the complaint?

11 MR. NAVARRO: When the complaint makes actual  
12 allegations like this one does here at 4.3 saying that the  
13 hospital shared protected medical information. And then it  
14 jumps to --

15 THE COURT: I don't think that's right. I think that  
16 you think you have evidence that controverts that. But I think  
17 at the 12(b) (6) stage I have to take the pleadings that are in  
18 the complaint as pleaded as true even if you're going that's  
19 just flat wrong and I'm going to even get sanctions and money  
20 for this. But I don't think I can consider something that was  
21 not pled or attached to or referenced in the complaint.

22 You are doing what I think is basically what you  
23 would do after you've done some discovery, which is this is so  
24 wrong, I get to attach this. I don't think that that is a  
25 12(b) (6) exception. This is so wrong, I get to attach

1 extraneous evidence. I don't think that exists. And I'm not  
2 doing that for any reason other than if I do that, I'll just  
3 get reversed and we'll be back here again if I consider things  
4 that I'm not permitted under the rules to consider.

5 Now, I thought that the rules were fairly clear. I  
6 have to take the statements that the complaint as true and I  
7 can't consider any other documents that weren't either exhibits  
8 to the complaint or that weren't specifically referenced in the  
9 complaint. Do you think that there's a different rule?

10 MR. NAVARRO: I'm saying that there's evidence that  
11 the allegations made in the complaint have no --

12 THE COURT: But that's a different -- but you  
13 answered a different question. I'm telling you that I think  
14 that the rule at 12(b) (6) -- and I'm not saying that I have an  
15 opinion one way or the other on the merits of the case. I'm  
16 talking about what am I allowed to look at at this stage. I  
17 think at a 12(b) (6) stage I can only look at what's in the  
18 complaint, what's attached to the complaint, and what is  
19 specifically referenced in the complaint. Do you think there  
20 is something that allows me to do more than that? If so, I  
21 need to see it.

22 MR. NAVARRO: Well, I think we've referenced what we  
23 think would apply, which is the limited caselaw that talks  
24 about what can be put before the Court in a Rule 12 to rebut  
25 some of the allegations made in the complaint.

1                   THE COURT: And what is that other than the three  
2 things that I've just delineated?

3                   MR. NAVARRO: Well, it would be the primary  
4 components of the investigative file that --

5                   THE COURT: No, no, no. I'm saying why do you -- so  
6 were the primary components of the investigative file attached  
7 to the complaint?

8                   MR. NAVARRO: The complaint has only the first  
9 amended complaint and it has no attachments.

10                  THE COURT: Right. Were they attached -- okay. Were  
11 they attached to any complaint?

12                  MR. NAVARRO: They were not attached. There's no  
13 exhibits attached to any of the live complaints.

14                  THE COURT: I knew the answer to that, but I just  
15 want to make sure that I didn't miss it.

16                  MR. NAVARRO: I know.

17                  THE COURT: And so were they referenced in the  
18 complaint? Was the investigative -- the components, primary  
19 components of the investigative file referenced in the  
20 complaint?

21                  MR. NAVARRO: I mean, not directly, Your Honor.  
22 They're not referenced in that the -- I mean, this was why they  
23 were -- the content was shared with counsel. Okay?

24                  THE COURT: Right. And I think that's just kind of  
25 pre-suit negotiations. Or even post-suit. We're going, hey,

1 this is going to end poorly for you, take a look at this. I  
2 used to do that when I was a defense lawyer. But I will say as  
3 a plaintiff's employment lawyer, I pled things -- you know, for  
4 example, that my client was discriminated against because of  
5 race. I may not have had a smoking gun at that point, but you  
6 take what is in the complaint as true. The employer wouldn't  
7 then be able to respond to that saying on no, it wasn't because  
8 of that, it was because of all these other reasons in response  
9 to a 12(b) (6). You can do that in a motion for summary  
10 judgment.

11 MR. NAVARRO: Yeah.

12 THE COURT: So that's why I'm trying to figure out if  
13 I can only consider what's specifically said in the complaint,  
14 what is attached to the complaint, and what is specifically  
15 referenced, documents that are not in the complaint but that  
16 are referenced by them -- like the investigative files. That's  
17 what I'm trying to find out. Are those exhibits referenced in  
18 the complaint?

19 MR. NAVARRO: No, the complaint is very artful in  
20 terms of avoiding exactly doing any of that.

21 THE COURT: So how can I consider --

22 MR. NAVARRO: Because -- because, you know, Your  
23 Honor, but the Rule 11 standards for pleadings mean something.  
24 Okay?

25 THE COURT: Well, no. So that's a different motion.

1 That doesn't mean that you get around 12(b)(6) by attaching  
2 things that I can't consider at the 12(b)(6). That may be a  
3 motion for sanctions. And I get those, right? You've pled  
4 things that were not in good faith or that you as attorney  
5 didn't meet the Rule 11 standard. That's a different motion.  
6 That doesn't mean the sanction is I get to consider your  
7 evidence, right? Because again, that's just going to get me  
8 reversed. Right?

9 MR. NAVARRO: I think you're correct about that.

10 THE COURT: Okay. So then my other question is, is  
11 there a way for prosecutors to be sued that -- outside of  
12 prosecutorial immunity? The knowing standard, right? All  
13 right. And so they say that they knew. Now, you may be able  
14 to disprove that, and you may be able to have -- you know, make  
15 some hay with that and you may be able to file motions with  
16 that. But how can they -- how can you get that dismissed if I  
17 have to take what's in the complaint as true and I can't  
18 consider your exhibits because they weren't referenced without  
19 them being able to do some discovery of it?

20 MR. NAVARRO: Well, because of the prosecutorial  
21 immunity.

22 THE COURT: Okay. But we just said that there is a  
23 knowing exception to that, right?

24 MR. NAVARRO: Well, there's a knowing exception. But  
25 if they are within the scope of the prosecutorial function, it

1 doesn't matter. They can be malicious in their intent and  
2 still be entitled to absolute immunity.

3 THE COURT: Right. So if they're in the grand jury  
4 room presenting it. But what about before that when they are  
5 still in the investigative things?

6 MR. NAVARRO: Well, I guess that's where we get into  
7 that there is no investigative phase as pleaded --

8 THE COURT: Well, they allege that there was. I  
9 mean, it's --

10 MR. NAVARRO: Well, they say that they're going on  
11 information and belief.

12 THE COURT: But they pled it --

13 MR. NAVARRO: They're spinning it. They're -- you  
14 know.

15 THE COURT: And I get your frustration. I can sense  
16 that you feel like they're making stuff up in their complaint.  
17 I get that. But if the rules say I have to take their  
18 complaint at face value, no matter how badly you disagree with  
19 it, how can I ignore it? And if they say that they knew --  
20 like I said, there may be a different motion coming. If they  
21 pled that they knew and you put them on notice ahead of time,  
22 that may be a whole different motion hearing. But if I have to  
23 take their complaint at face value and they say that they knew,  
24 there is a knowing exception and/or at least the investigative  
25 -- they were alleging --

1 MR. NAVARRO: That would have to be outside of the  
2 scope.

3 THE COURT: Right.

4 MR. NAVARRO: They would have participated in the  
5 investigative component of --

8 MR. NAVARRO: I mean, if the Court is -- it's a  
9 conclusory allegation. But if the Court feels like, okay,  
10 well, they say it's --

14 MR. NAVARRO: Yeah.

20 MR. NAVARRO: Yes.

24 So if there are circumstances where a prosecutor  
25 could be -- have a 1983 claim against them, just like the

1 sheriff could -- and we talked about the possible different  
2 standards for that. And I'm not saying how I would -- I really  
3 don't know what the evidence is going to show. But at this  
4 phase, I just don't know how I can get around the fact that the  
5 complaint says what it says, I have to take it as true, and I  
6 can't consider your exhibits because they weren't referenced in  
7 the complaint.

8 MR. NAVARRO: Well, if the mere allegation of that  
9 there was a conspiracy outside of the prosecutorial function, I  
10 mean, is enough to defeat the Rule 12 on it. But, I mean --

11 THE COURT: Like I said, you said that you've had  
12 communications with them that you think should have disabused  
13 them of that, that's a different motion. But we're not here on  
14 that motion. We're here on does the case get dismissed.

15 And so to me if the complaint would support an  
16 allegation that there was conduct by the prosecutors and the  
17 sheriff that would possibly fall outside of immunity, how can I  
18 not let them do discovery on that, at least on the bifurcated  
19 stage, the limited stage of addressing immunity first.

20 MR. NAVARRO: Well, they would be limited if there is  
21 -- what I'm seeing these days on that --

22 THE COURT: Right, yes.

23 MR. NAVARRO: -- the discovery is a very limited  
24 discovery on the issue of the immunity.

25 THE COURT: Correct.

1 MR. NAVARRO: And it's not a full-bore discovery on  
2 everything.

3 THE COURT: Right.

4 MR. NAVARRO: It's a limited discovery option. And  
5 that seems to be the answer in some of these cases where --

6 THE COURT: So it seems to me sometimes -- for  
7 example, the counties get sued. They say you know what, we're  
8 going to file a qualified immunity motion, but we don't want to  
9 go through the hassle of having the two stages, so we'll just  
10 do all at once. Because we want to take two depositions, one  
11 limited to immunity and one that's wide open. Sometimes they  
12 do that. But that's -- the Defendant has the right to limit  
13 discovery to just the immunity question. And so we can do that  
14 in the bifurcated way. What I'm trying to do is, like I said,  
15 figure out how if prosecutorial immunity -- if the complaint is  
16 true, which I know you disagree with. But if the complaint is  
17 taken as true, how do you get around the fact that they should  
18 at least get discovery on that?

19 MR. NAVARRO: Well, what kind of a discovery are we  
20 talking about?

21 THE COURT: Limited to immunity.

22 MR. NAVARRO: Are we talking about a written  
23 discovery, deposition discovery against the individuals? I  
24 mean, what are we talking about?

25 THE COURT: I mean, I don't have to micromanage the

1 case. We're professionals. And so I try not to micromanage  
2 the case. I really try to stay out of the cases. It's not my  
3 case, it's y'all's case. It's your party's case. So it seems  
4 like to me you've said that you've done Section 1983 work. And  
5 I assume you've done the bifurcated discovery, right?

6 MR. NAVARRO: Yes, we've done it. I mean, inevitably  
7 you get into this agreement is about the edges of --

8 THE COURT: I'm calling the judge. Yeah, sorry. No,  
9 I get that.

10 MR. NAVARRO: But yes, we've done that. And most of  
11 that stuff does get worked out. And I think that what we would  
12 want to know is what is the source of some of these  
13 allegations.

14 THE COURT: I understand.

15 MR. NAVARRO: You know? Like where are you getting  
16 this.

17 THE COURT: And I'm not commenting one way or the  
18 other. I'm not suggesting that you all have done anything  
19 sanctionable. I'm not suggesting that your clients have done  
20 what they're accused of. What I'm telling you is that at the  
21 12(b)(6) stage my options are very limited. And that is that I  
22 have to take the complaint as true even though you don't like  
23 what it says, and I can't consider stuff that is outside of the  
24 complaint. And so I just think that that's the standard.

25 So what I would -- I think it makes sense for me to

1 deny the three motions to dismiss moot, the motion to strike  
2 the sealed exhibits as a result. All of them are without  
3 prejudice. Although I don't know that a motion to dismiss is  
4 going to be the proper vehicle. And then for the parties to  
5 confer about a discovery schedule that is limited to just  
6 immunity and have that limited discovery and then brief that.  
7 And then we'll stay the case pending our resolution of that.  
8 That is my proposal.

9 MR. NAVARRO: And we'll confer about that. If you're  
10 going to deny their motions, then that triggers our answer date  
11 I would imagine.

12 THE COURT: I mean, nobody is going to default you.  
13 I mean, you have appeared.

14 MR. NAVARRO: Well, but we make admissions and  
15 denials in that answer. So if we're going to do that, we might  
16 as well do that so that you have admissions and denials. Okay?

17 THE COURT: Sure. Yeah.

18 MR. NAVARRO: And that way I think it helps define  
19 the scope of the issues.

20 THE COURT: Right. Then you want your affirmative  
21 defenses and stuff like that.

22 MR. NAVARRO: One thorniest issue here is of course  
23 how do you deal with attorney (indiscernible) presentation of  
24 the grand jury. You know? I mean, I really am wrestling with  
25 exactly -- I mean, I myself don't even get into the details --

1                   THE COURT: Let me just ask the plaintiffs how could  
2 that even remotely be a part of a case? That has got to be  
3 within prosecutorial immunity, doesn't it?

4                   MS. GARZA: Yes, Your Honor. We would agree --

5                   THE COURT: So you're not going to ask anything about  
6 what happened in the grand jury room?

7                   MS. GARZA: Absolutely not.

8                   THE COURT: Because that's not going to happen.

9                   MS. GARZA: That's correct, Judge.

10                  THE COURT: Does that deal with your -- Ms. Barrera,  
11 I don't want (indiscernible) deal with any concerns that you  
12 all have that -- and I'm sorry, I shouldn't talk to Ms.  
13 Barrera. If you want to go visit with them, do you want to  
14 find out so we can nail down anything that you think might  
15 because a problematic --

16                  MR. NAVARRO: As long as no adverse inferences can be  
17 drawn from that, that we're not going to allow discovery about  
18 what happened in the grand jury room.

19                  THE COURT: Well, I'm not going to draw any. And  
20 we're not at the jury phase as well. And I would definitely  
21 tell the jury, just like happens in criminal cases, you can't  
22 talk about what happens in grand jury. It's one of the most  
23 important secracies that we have.

24                  MR. NAVARRO: Exactly.

25                  MS. GARZA: And we understand the distinction, Your

1 Honor, between the prosecutorial function and the investigative  
2 function.

3 THE COURT: Right. So do you all need to figure out  
4 when the prosecutorial function kicked in? Is there I guess  
5 caselaw on when that clock started?

6 MS. JOHNSON: We submit it's at the point of the  
7 grand jury presentation, Your Honor.

8 THE COURT: All right. So if you disagree with that  
9 -- so that's on the record. You need to figure out when you  
10 think the prosecutorial function kicks in. I don't know the  
11 answer to that.

12 MR. NAVARRO: I didn't catch --

13 MS. JOHNSON: I'm sorry. At the point of the  
14 presentation to the grand jury. So actions that -- with regard  
15 to --

16 THE COURT: So a lot of times there's --

17 MR. NAVARRO: Okay, but there's allegations that says  
18 there's pre-agreements about how to deal with references from  
19 the hospital.

20 MS. JOHNSON: Right.

21 MR. NAVARRO: Okay. So --

22 MS. JOHNSON: Our position is that that is not a part  
23 of the quasi-judicial function.

24 THE COURT: All right. Well, you all can hash that  
25 out. But that is something I think you need to hash out. And

1 if you can't get that hashed out, then I can probably set that.  
2 And that will make the discovery process a lot more efficient.

3 For example, I can tell you a grand jury indictment  
4 happens at docket entry number 20 in a federal case. And there  
5 has been an information or a complaint, there's been all kinds  
6 of stuff that has happened weeks and months before that sure  
7 looks like a prosecutorial function. Because they're in there  
8 and they're charging. And so I think you all need to put some  
9 thought as to when the prosecutorial function would kick off.  
10 And it's not the grand jury. It's before that.

11 MS. GARZA: Your Honor, and I think that it's also  
12 not necessarily a timeline, but there may have been some  
13 investigative functions that were occurring -- that's what the  
14 evidence will bear out. I mean, there may be some stuff that  
15 was done in furtherance of obtaining the indictment and the  
16 grand jury presentation. But if there was some investigation  
17 by the DA's office of witnesses or conversations, that -- you  
18 know, so it's not really a need timeline, it's just the actions  
19 itself.

20 THE COURT: Like I said, the biggest fight that I see  
21 on this kind of first phase is figuring out when and where the  
22 prosecutorial function kicks in. If it is during the  
23 prosecutorial function, there's no discovery because it doesn't  
24 make any sense. And I think everybody would agree.

25 MS. GARZA: Yes, Your Honor.

1                   THE COURT: The sheriff I think is fairly  
2 straightforward. I mean, you often run on the sheriff --

3                   MR. NAVARRO: The sheriff we can work out.

4                   THE COURT: Yeah.

5                   MR. NAVARRO: I think here the -- I mean from my --  
6 the prosecutorial function is when the casfile is referred to  
7 the DA for review.

8                   THE COURT: And so really the time that I see these  
9 cases against prosecutors is when it's a malicious prosecution  
10 case. And, you know, those are fairly few and far between and  
11 fairly specific. And you've got some smoking guns out there.  
12 It's not necessarily linked to they just misread a statute or -  
13 - I mean, if you've got evidence that say they saw that and  
14 they chose to ignore it, you know, maybe that's one thing. But  
15 if they should have seen it, you understand some of the  
16 concerns, you're going to have to persuade me that that is  
17 going to be enough.

18                   MS. GARZA: Understood.

19                   MR. NAVARRO: So if you want an agreed order from us  
20 on the scope of --

21                   THE COURT: Right. No, not on the --

22                   MR. NAVARRO: Scope of the discovery?

23                   THE COURT: No. What I would like is an agreed  
24 schedule. So you all get together, figure out what you want as  
25 far as -- you guys can send whatever discovery you want out,

1 whether it's written depositions or whatever. I'm not going to  
2 micromanage that. You all figure that out. The only thing I  
3 want from you is a timeline. Like, do you want -- whatever it  
4 is. Two months, three months for discovery. And then motions  
5 filed 30 days after that. You know, I'm just making numbers  
6 up. So it's not uncommon to have three months of discovery,  
7 limited discovery to immunity. Then you've got the motion for  
8 summary judgement. They don't have any evidence of knowing or  
9 -- outside of the prosecutorial whatever. There's nothing  
10 about the sheriff. And they get to respond with whatever they  
11 think they have. I can resolve that.

12 If anything is still alive, then the case just goes  
13 forward with wide-open discovery with the new scheduling order.

14 MR. NAVARRO: With a new one, yeah.

15 THE COURT: Right. We do a completely new scheduling  
16 order and then it's wide open with whatever is left.

17 MS. GARZA: Your Honor, would you like us to kind of  
18 revise the case management plan and work from there? Because  
19 we do have -- we kind of addressed this a little bit with Mr.  
20 Navarro's associate.

21 THE COURT: Well, I mean, so what you have here is  
22 not particularly helpful.

23 MS. GARZA: No.

24 THE COURT: Because it says 90 days before trial. I  
25 haven't set trial.

1 MS. GARZA: Right. But we do have -- in the  
2 management plan itself -- not the scheduling order, but in the  
3 management plan itself, we do kind of have dates that run from  
4 a court's ruling. So we can probably work off of that.

5 MR. NAVARRO: We'll file an amended one --

6 THE COURT: You don't have to do that. So here's the  
7 way that these typically happen on the 1983 cases. You submit  
8 the I guess first phase scheduling order. It doesn't have a  
9 trial date. All it's got is discovery and motions cutoff.  
10 Okay? Then after I rule on that, the last line is going to be  
11 the parties should confer -- assuming that summary judgment  
12 wasn't granted, the parties should confer and give me a full  
13 scheduling order, or maybe we can have a status conference.  
14 That whatever is left, we get a full-blown scheduling order  
15 from it.

16 That's why I was saying the 90 days before trial  
17 doesn't help very much, because that presupposes wide open  
18 discovery.

19 MS. GARZA: In all fairness, we really didn't know  
20 what to do with that.

21 THE COURT: That's okay. That's all right. I mean,  
22 this was -- it's different.

23 The reason why I set these for these conferences is  
24 sometimes the defense doesn't want to do the bifurcated  
25 approach; they want to do just one global and let's get it over

1 with. We'll file two phases of motions along the way. And if  
2 we need continuances because I haven't ruled because the two  
3 motions were filed too close together, then I just grant  
4 continuances.

5 MR. NAVARRO: I think -- I'm thinking through some of  
6 the logistical -- so obviously -- there's things pleaded in  
7 here about knowledge and all that. I mean, I don't know who  
8 Ms. Gonzalez, the Plaintiff, is not going to know answers to  
9 those --

10 THE COURT: We're not going to sort that out here.  
11 Do your discovery.

12 MR. NAVARRO: Yeah. Yeah. Okay.

13 THE COURT: All right. So like I said, everybody is  
14 on notice of what's at issue. You all try to work out when you  
15 think the prosecutorial function kicked in. If you think that  
16 there's some overlap, you all try to have that conversation  
17 ahead of time. Really try to get it to before you're in a  
18 deposition so that you don't waste your time and have to do  
19 multiple depos or whatever. Try to figure it out. If you need  
20 that resolved ahead of time, then you all can involve me, or I  
21 can get a magistrate judge to handle it super-quick. Okay?

22 MR. NAVARRO: Very well, Judge.

23 THE COURT: All right. So for the record, Docket  
24 entries 13, 16 and 23 are denied without prejudice, those are  
25 the motions to dismiss, just based on the allegations that are

1 in the complaint, which I am required to take as true. I  
2 believe that it makes sense for us to go forward on the  
3 bifurcated process to do immunity discovery only. The parties  
4 are going to confer and submit a proposed schedule for just the  
5 immunity portion and then they're going to confer about the  
6 scope of discovery. Docket Entry 27, which is the motion to  
7 strike sealed exhibits is denied as moot. Okay?

8 MS. JOHNSON: Thank you, Your Honor.

9 MR. NAVARRO: Very good, Your Honor.

10 THE COURT: All right, thank you. Appreciate it.

11 (Hearing adjourned at 1:56 p.m.)

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, court-approved transcriber,  
4 certify that the foregoing is a correct transcript from the  
5 official electronic sound recording of the proceedings in the  
6 above-entitled matter.

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10 Sonya Ledanski Hyde

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